

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BRONX LOBSTER PLACE, LLC

Employer

and

Case 02-RC-191753

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT LODGE 15,
LOCAL LODGE 447

Petitioner

**PETITIONER'S MEMORANDUM IN OPPOSITION TO EMPLOYER'S MOTION TO
STAY CERTIFICATION OF REPRESENTATIVE**

INTRODUCTION

Employer Bronx Lobster Place, LLC has filed a motion to stay the certification of the Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 as representative pending its filed request for review. Because the Employer's motion is untimely, the motion fails to show why the granting of extraordinary relief is necessary under the circumstances and the merits of the request for review are of no relevance to the motion, the motion should be denied. Petitioner hereby submits this memorandum in opposition to the Employer's motion. For all of the reasons set forth herein and any others the Board may find, the Employer's motion should be denied, and the Regional Director's certification should continue to remain in full force and effect.

STATEMENT OF THE CASE

The Petitioner filed an election petition in this matter on January 24, 2017. A stipulated election agreement was reached on February 1, 2017, and an election was held on

February 24, 2017. A majority of voters in the election chose the Petitioner as their bargaining representative. The Employer filed objections to the election and a hearing on the objections was held on April 10, 2017. The Employer's objections were overruled, and the Regional Director issued the certification of the Petitioner as the bargaining representative on October 20, 2017 after a full consideration of the merits. The Employer filed a request for review of the Regional Director's decision and certification with the Board on November 3, 2017. The Petitioner filed unfair labor practice charges against the Employer on November 21, 2017. In response, the Employer filed its Motion to Stay Certification of Representative Pending Filed Request for Review on December 15, 2017.

ARGUMENT

I. THE EMPLOYER'S MOTION TO STAY CERTIFICATION IS UNTIMELY

It is clear from the Board's Rules and Regulations that a request for extraordinary relief must coincide with the request for review, or at the very least be filed prior to the same deadline. Section 102.67(i)(1) of The Board's Rules and Regulations reads:

Format of Request: All documents filed with the Board under the provisions of this Section shall be double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof **and any motions under paragraph (j) of this section**; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, **prior to the date the document is due.** Id. (emphasis added).

A plain reading of this subsection clearly indicates that any motion for extraordinary relief under Section 102.67(j) is to be filed at the same time as a request for review. The 50 page limit set out in the rule is in reference to the entirety of the request for review, including its

supporting documents; the rule specifically states the inclusion of briefs in support thereof and motions for extraordinary relief under 102.67(j) in the 50 page limit, an unequivocal reference to the fact that the documents must be filed together. Moreover, 102.67(i)(1) also states that in order to obtain permission to exceed such a page limit, the party must move for such permission in writing to the Board no less than five days prior to the date the document is due, pointing further to the fact that any motion for extraordinary relief must be filed at the same time as the request for review, or at the very least prior to the same filing deadline. Because the filing deadline for a request for review is 14 days after the Regional Director's final disposition of the proceeding, *see* NLRB Rules and Regulations 102.67(c), the time to file a motion for extraordinary relief has passed and therefore the motion should be denied.¹

II. THE EMPLOYER'S FILED REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION IS NOT GROUNDS TO STAY THE CERTIFICATION

The bulk of the Employer's argument that it is entitled to a stay of the certification centers on the fact that it had previously filed a request for review of the Regional Director's decision and certification. This contention is simply false. The NLRB's Case Handling Manual on Representation Proceedings, Section 11274 states that "Neither the filing of a request for review nor the grant of a request for review shall automatically stay the regional director's action unless the Board orders otherwise." *Id.* Moreover, the NLRB Rules and Regulations Section 102.67(j) states that "[Extraordinary relief] will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion." *Id.* The fact that the

¹ It is worth noting that the Employer's tardiness in filing the motion is further an indication that the stay is not necessary under the circumstances. Were the Employer's motion made out of necessity, it should and would have been made at the time the Employer made its request for review.

Employer has filed a request for review in and of itself is not a showing that it is necessary the Board grants the stay of certification.

The only legal argument that the Employer makes in supporting this contention is that if it were to engage in bargaining it would waive its right to challenge the decision and the certification. That is neither here nor there and in no way demonstrates that it is necessary under the circumstances to grant the extraordinary relief requested. The Employer is merely attempting to use its motion to stay certification as a response to the unfair labor practice charges filed by the Petitioner and absolve itself of responsibility for such charges. Ignoring the merits of such unfair labor practice charges, it is well-established that unfair labor practices can be committed while an employer's request for review is pending, and that employers run the risk that unfair labor practices will be committed commencing at the date of certification. *See Allstate Insurance Co.*, 234 NLRB, 193, 193 (1978) ("It is well established that an employer refuses to recognize a certified labor organization at its peril"). *See also Volkswagen Group of America, Inc.*, 364 NLRB No 110, slip op. at 2 fn. 4 (2016) (citing *L. Suzio Concrete Co.* 325 NLRB 392, 396 (1998), *enfd. mem.* 173 F.3d 844 (2d Cir. 1999)); *Madison Detective Bureau, Inc.*, 250 NLRB 398, 399 (1980).

Because there is well-settled Board precedent that demonstrates unfair labor practices can be—and often are—committed while an employer's request for review is pending, the Employer's contention that its request for review makes a grant of a stay of certification necessary is without merit. This position contradicts well-settled Board law as well as its Rules and Regulations. *See* NLRB Rules and Regulations 102.67(j)(2) (A request for review does not

entitle the Employer to relief in the interim). The motion is merely an attempt by the Employer to circumvent its responsibilities under the Act and should be denied in its entirety.²

III. THE MERITS OF THE EMPLOYER'S REQUEST FOR REVIEW ARE NOT GROUNDS TO STAY THE CERTIFICATION

Despite its contention to the contrary, the Employer's claim that the merits of the request for review are sufficient for the Board to grant the extraordinary relief it requests is without merit. The NLRB Rules and Regulations clearly state that a party requesting review of the Regional Director's decision is not entitled to relief in the interim and, in fact, must show that the extraordinary relief requested is necessary under the circumstances. *See Id.*; *see also* NLRB Case Handling Manual on Representation Proceedings, Sec. 11274. The Employer states no reason why the merits of its request for review create the necessity that the Board stay the certification. Rather, it attempts to rehash these issues in its motion by claiming that because the Employer believes the request for review is meritorious, it is entitled to a stay in the interim. As the NLRB Rules and Regulations indicate, that is simply not the case. Thus, the merits of the Employer's request for review do not justify a stay of the certification.

CONCLUSION

For all of the above-stated reasons, the Employer's motion to stay certification should be denied, and the Petitioner should remain the certified bargaining representative for the unit employees forthwith.

² The Employer's motion also argues a stay of certification is necessary because the Board recently requested public input for its Rules and Regulations. That assertion is preposterous. Just because the Board has requested input from the general public regarding its Rules and Regulations does not necessarily mean that it will affirmatively decide to modify such Rules and in no way entitles the Employer to extraordinary relief while the Board's rulemaking process plays out.

Respectfully submitted,

District 15, IAMAW, AFL-CIO

By: _____/s/_____
Nicholas A. Scotto, Esq.
GENERAL COUNSEL
District 15, IAMAW
652 4th Ave
Brooklyn, New York
(718) 422-0090
nscotto@iamdistrict15.org

CERTIFICATE OF SERVICE

I hereby affirm that a true and correct copy of the foregoing Brief was served, via electronic mail, upon:

Tyler T. Hendry, Esq.
Louis P. DiLorenzo, Esq.
Bond, Schoeneck, & King, PLLC
600 Third Avenue, 22nd Floor
New York, New York 10016
thendry@bsk.com
ldilorenzo@bsk.com

David E. Leach III, Regional Director
National Labor Relations Board, Region 22
Veterans Administration Building
20 Washington Place, 5th Floor
Newark, NJ 07102
David.leach@nlrb.gov

John J. Walsh, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
John.walsh@nlrb.gov

/s/
Nicholas A. Scotto, Esq.

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